

Filene's, Inc., a division of the May Department Stores Company and United Food and Commercial Workers Union, Local 919, AFL-CIO.
Case 34-CA-6180

August 12, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On May 17, 1994, Administrative Law Judge Howard Edelman issued the attached decision. The Charging Party filed exceptions, and the Respondent filed a brief opposing the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

The Charging Party has specifically excepted to the judge's failure to credit the testimony of Betsy Hodgson that, approximately 10 days following her discharge for suspected theft of store merchandise, she contacted the Respondent and offered to produce a store receipt assertedly documenting her purchase of the merchandise. Although the judge did not specifically address this testimony, he discredited Hodgson's testimony in general and found that the "credible evidence . . . established that Hodgson was unable to provide Respondent with a receipt for the suspected shoplifted merchandise." We find that the judge's credibility resolutions are supported by the record. In addition, even if accepted as true, Hodgson's testimony concerning her belated offer to produce the alleged receipt for the merchandise would not affect our conclusion that Hodgson was lawfully discharged. The credible evidence establishes that the Respondent adhered to its disciplinary procedures in its treatment of Hodg-

¹The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge inadvertently failed to address specifically the complaint allegation that the Respondent violated Sec. 8(a)(1) of the Act by threatening employees with less favorable working conditions if they selected the Union as their bargaining representative. Our review of the record reveals that no evidence was adduced in support of this allegation, and we shall accordingly dismiss it.

In addition, the judge inadvertently stated in the second paragraph of the analysis and conclusions section of his decision that Hodgson engaged in union activity at the Respondent's Milford, Connecticut store on April 29, 1993. The judge correctly noted in the statement of the case section of his decision that that activity occurred on April 30, 1993.

son. On its suspension of Hodgson for suspected theft, the Respondent initially allowed her 24 hours to produce a receipt for the merchandise. Hodgson was actually given more than 1 week to do so. Hodgson failed to produce a receipt within the allotted time period, and was accordingly lawfully discharged on May 4, 1993.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Ursula L. Haerter Esq., for the General Counsel.

Stephen D. Shawe, Esq. (Shawe & Rosenthal), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on December 7 and 8, 1993, in Hartford, Connecticut.

Based on charges filed by United Food and Commercial Workers Union, Local 919 AFL-CIO (the Union), a complaint issued against Filene's Inc., A Division of the May Department Store Company (Respondent), on August 20, 1993, alleging the discriminatory discharge of an individual employed by Respondent, and several independent allegations of Section 8(a)(1) of the Act.

On the entire record, including my observations of the demeanor of the witnesses and the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Meriden, Connecticut, where it is engaged in the operation of a retail department store. Respondent annually grosses in excess of \$500,000 in the operation of its business. Respondent also purchases goods and products valued at in excess of \$5000 directly from States other than the State of Connecticut. It is admitted, and I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Betsy Hodgson, the alleged discriminatee, in this case was employed by Respondent as a salesperson for at least several months prior to April 21, 1993. During the month of April, the Union was engaged in an organizing campaign at Respondent's Meriden store. However, prior to April 23, 1993, there is no evidence that Respondent had any knowledge of any activity that Hodgson may have engaged in on behalf of the Union.

According to Hodgson's testimony, much of which I do not credit, as set forth below, she returned a pair of shoes

on the evening of April 21, which she allegedly had purchased some time ago. It is admitted that on such return the salesperson handling the return, gives the person making such return, whether such person is employed by Respondent, or an outside customer, a receipt, so that when leaving the store, such person can prove a valid purchase or exchange, if challenged by Respondent's security personnel. According to the testimony of Hodgson, the salesperson making her exchange failed to do so.

According to the testimony of Hodgson, when she got home that evening and tried on the shoes and they didn't fit her properly, she decided to return them the following day to obtain the correct size.

Respondent has a company rule that employees returning store merchandise must present the bag which contains the merchandise to be returned on arriving at work to the store security officer so that the bag, or box can be sealed with security tape. This is a measure designed to prevent shoplifting.

On April 22, Hodgson reported for work allegedly with the shoes to be returned in a leather pouch. She did not present the pouch, or in any other manner disclose to the security department that she had the shoes with her and intended to replace them for a pair of the correct size.

Respondent's procedure in making an exchange is to do so through a salesperson in the appropriate department and receive a receipt indicating such exchange. Hodgson, by her own admission failed to follow this procedure. Instead, Hodgson, incredibly testified that she simply went over to the rack where the shoes were displayed, removed the pair she allegedly had exchanged of April 21 from her pouch, and took from the rack a similar pair, but of the correct size. Hodgson was observed by Respondent's security officer, Linda Cullen, over a closed circuit TV camera, taking the shoes from the rack. She was not observed returning any shoes which Cullen credibly testified she would have seen had it happened. Cullen further credibly testified that since the VCR was broken and she could not tape the action, she called over area sales manager, David Schofeld, to observe the television camera with her. According to the credible testimony of Cullen after Hodgson selected the shoes, she walked back to the counter where she worked, placed the shoes underneath the counter, removed the store packaging, took the sneakers she was wearing, which was not Respondent's authorized dress code, and placed the shoes on her feet. Cullen continued to observe Hodgson through her lunch period. At no time did she attempt to have the shoes rung up on any cash register.

At 1:30 p.m., Hodgson still wearing the shoes, left the store. Cullen followed her as she proceeded to walk out the sidewalk. At this point in time, Cullen asked Hodgson to stop and ask her whether she had a receipt for these shoes. Both Hodgson and Cullen testified that Hodgson said she had a receipt and began looking through her pockets. When she couldn't find one she admitted that she didn't have one on her person, but that it was in her bag in the stockroom. Cullen and Hodgson went to the stockroom and Cullen fumbled through her bag but was unable to come up with any receipt. Cullen then asked Hodgson when she purchased the shoes. Hodgson stated that she purchased the shoes on April 21. This testimony by Hodgson contradicts her prior testimony wherein she testified that she had purchased the shoes

some time ago, and had merely exchanged the shoes on April 21. I find such contradiction seriously undermines her credibility. In addition, during this part of her testimony, Hodgson was visibly nervous and hesitant. I was adversely affected by her demeanor during this portion of her testimony.

During Cullen's interview of Hodgson, she was asked by Cullen if she was attempting to exchange the shoes why she hadn't had the bag containing the shoes to be sealed with security as required. Hodgson replied that she hadn't done so because she didn't have a receipt with her. This is another serious contradiction by Hodgson. When initially confronted by Cullen outside, Hodgson looked for a receipt she knew she didn't have and then suggested that it was in her bag in the locker room, when she knew that was not so either. In this regard, Hodgson was clearly untruthful. When Hodgson insisted that she either paid or exchanged her shoes on April 12, Cullen asked what register and what salesperson had handled the transaction, Hodgson could not recall the salesgirl, her description, or the location of the register. This, in my view also seriously affects her general credibility.

I completely credit the testimony of Cullen. She testified in a most candid, forthright, and detailed manner both on direct and cross-examination. Moreover, her testimony was totally corroborated by her detailed notes of the incident and subsequent interview with Hodgson. Such notes were contemporaneous and part of her job duties.

During the interview between Cullen and Hodgson, Store Human Resource Manager Hall entered Cullen's office. Hall was briefed on the facts of this incident. Hodgson insisted that she could produce a receipt for the shoes that she had purchased on April 21. At this point Hodgson was again claiming that it was a purchase, rather than an exchange as she had originally testified. After listening to Hodgson, Hall told her that as of now, she was suspended, but indicated that if she were able to produce a receipt for the shoes within 24 hours she would be permitted to return to work, and if not, the suspension would become a discharge.

According to the incredible testimony of Hodgson, Hall told her that she was suspended because she did not have the bag containing the shoes she was allegedly returning security taped, and that she was merely asked to look for the receipt with no time limitation imposed.

Hodgson's testimony in this regard is totally and conclusively contradicted by Respondent's official personnel records dated April 22, 1993, which indicate as the reason for interview, "Theft of Merchandise," and under the heading "Specifically note any Offense, Policy Violation, etc." "Theft of Merchandise." Nowhere is there any mention in Hodgson's personnel file that she failed to have security tape over a package of merchandise to be returned, or any other reason for Hodgson's suspension. In other words, the evidence conclusively establishes that the sole reason for Hodgson's suspension was her suspected theft of merchandise.

It is interesting to note that General Counsel does not contend in the complaint, on the record, or in her brief that Hodgson's suspension was discriminatorily motivated. General Counsel's contention is that subsequent to the suspension, Hodgson engaged in certain union activity, of which Respondent became aware and because of such activity, the suspension was converted into a discriminatory discharge.

There is no management official at Respondent's Meriden store that has the authority to finalize a discharge of any employee. Such decisions are made in Respondent's home office in Boston. On April 22, after Hall's conversation with Hodgson, Hall called Cathy Gentelosi, the chief director of human resources in Boston. Hall briefed Gentelosi as to everything that had transpired in the Hodgson matter, including her 24-hour notice to Hodgson to produce the receipt, if such existed.

Sometime in the midmorning of April 23, Hall contacted Hodgson at her home by telephone and asked her if she had located her receipt. Hodgson stated that she had not. Hall said nothing further, because the 24-hour period had not elapsed. However later in the day, Hall contacted Gentelosi and told her that Hodgson had not yet found the receipt. Gentelosi told Hall to terminate Hodgson if Hodgson failed to produce the receipt within the allotted 24-hour period conveyed to Hodgson.

Hall left the following day, April 24, for a 1-week vacation. Therefore she was unable to inform Hodgson of the decision to terminate her. Hall returned on May 3, but was unable to contact Hodgson until May 4. During their May 4 telephone conversation Hodgson told Hall that she still was unable to find the receipt required by Respondent in order to avoid her termination. In view of Hall's April 23 authorization from Gentelosi to terminate Hodgson if she were unable to produce the receipt, Hall at this time informed Hodgson of her termination.

The evidence conclusively establishes that Respondent regards theft of merchandise as a most serious offense. Respondent has always terminated any employee, in any of their stores whom they believed engaged in theft of merchandise. In the instant case I conclude that Respondent, based on the credible and undisputed facts of this case had excellent reason to believe that Hodgson had stolen merchandise.

On April 30, Hodgson engaged in her only union activity, which activity General Counsel contends Respondent had knowledge of, and which activity resulted in Respondent converting its suspension of Hodgson into discharge.

On the morning of April 30, 1993, Hodgson was present in Respondent's Millford Connecticut store, some distance from its Meriden store where Hodgson had been employed. She was dressed in sweat pants, a sweat shirt, and a baseball cap. This dress contrasted markedly with her usual store dress where employees were required to wear a skirt or dress. While present at the Millford lot, Hodgson was distributing union literature on the windshields of the automobiles parked at the lot.

Millford Store Manager Marcello Allegre drove into the Millford parking lot to park his car and go to work. As he got out of his car he noticed a woman dressed in a sweat shirt, sweat pants, and baseball cap placing some kind of leaflet on the cars parked in the lot. Allegre credibly testified he told the leafletter that such soliciting was not allowed and he would appreciate it the leafletting stopped. Hodgson stopped and turned facing Allegre and walked away. Allegre credibly testified that he did not recognize Hodgson.

Hodgson incredibly testified that after Allegre parked his car, he approached Hodgson and then stated, "Betsy, this is against mall policy for you to solicit on mall property." Allegre asked Hodgson to leave and walked into his store.

Allegre had previously worked at Respondent's Meriden store for about a year as a sales manager, where he supervised several departments. During his tenure at the Meriden store, he spoke to Hodgson very infrequently, just to say hello. He was able to address her by name, since all employees wore name tags. He had no direct responsibility over her. He worked on the second floor while Hodgson worked on the first floor. There were approximately 250 employees employed at the Meriden store. Allegre had transferred to the Millford store some 9 months previously. Given these facts I find no reason to believe that Allegre would recognize Hodgson, especially dressed in the attire described above. Moreover, I was impressed with Allegre's demeanor. His answer to questions put to him on both direct and cross-examination were forthright, and his testimony reflected a good recollection of detail. On the other hand, as set forth and described above, I was not impressed with the credibility of Hodgson.

After Allegre entered the store, he reported to his superior that he had observed a woman, he did not mention her name, distributing leaflets and that he took one and saw it was a union leaflet. The Millford store was one of Respondent's stores that the Union was attempting to organize. Allegre's superior reported the incident to the Boston office. The credible evidence established that the identity of the distributor was unknown to any of Respondent's agents.

Respondent held a series of employee meetings on or about April 22, 1993, in groups of 10-12 employees. These meetings were all conducted by Joseph Mahar, Respondent's store manager. During these meetings Mahar discussed a number of store issues including customer relations, business reports, sales, and the union campaign. During a meeting held on April 22 where Hodgson was in attendance, Mahar discussed the Union's organizational campaign. This discussion was guided by a text prepared in the home office in Boston. At the conclusion of Mahar's speech, he took questions from the employees in attendance.

General Counsel alleges that either during Mahar's speech, or some time during the question-and-answer period Mahar discussed Respondent's store no-solicitation policy. In this connection, Hodgson testified that Mahar told the employees assembled at this speech that if they felt harassed by union officials, or saw anyone from the Union, they should report it to him. Hodgson also testified that Mahar asked each employee whether they were for the Union.

Mahar testified that he asked no employee, in any manner, how they felt about the Union. Mahar admits that he did discuss the store's policy on no-solicitation and in this respect told the employees that outsiders were not permitted on the store's premises if they were disruptive to business, and requested that employees notify store security or management in such cases.

I credit Mahar's testimony. His testimony in connection with questions put to him on cross and direct examination were responsive and detailed. Moreover, I conclude that his testimony was logical and had a ring of truth to it. Hodgson, as set forth above, did not impress me as a credible witness. Moreover, the General Counsel was unable to produce any other witness to corroborate Hodgson's testimony.

Analysis and Conclusions

In determining whether an employer discriminates against an employee because of his membership in, or activity on behalf of a labor organization, General Counsel has the burden of proving that the employee's membership in, or activities on behalf of, such labor organization was a motivating factor in the discrimination alleged. Only when such factor is established does the burden shift to the employer to establish that such action would have taken place in the absence of the employee's membership in, or activities of such labor organization. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

An essential element necessary to establish a discriminatory discharge is knowledge of the employee's union activity. *Bryant Cooper Steakhouse*, 304 NLRB 750, 751 (1991). In the instant case the credible evidence fails to establish that Respondent was either expressly, or impliedly aware of Hodgson's sole instance of union activity, namely her April 29 handbilling of union literature on automobile windshields in Respondent's Millford store. Accordingly, I conclude that in these circumstances, General Counsel has failed to establish her *Wright Line* burden. I therefore conclude Respondent's discharge of Hodgson did not violate Section 8(a)(1) and (3) of the Act, as alleged.

Moreover, even if I were to conclude that General Counsel had established a prima facie case, based on the evidence in this case, I would conclude that Respondent would have discharged Hodgson notwithstanding such prima facie case. In this regard, General Counsel has admitted that the suspension of Hodgson was not discriminatorily motivated. The credited testimony, and incontrovertible documentation conclusively establish that the reason for such suspension was Respondent's belief that Hodgson was guilty of shoplifting. The credible evidence further established that Hodgson was unable to provide Respondent with a receipt for the suspected shoplifted merchandise. The credible and un rebutted testimony also conclusively established that in all such cases at all of Respondent's stores, employees suspected of shoplifting are uniformly terminated from Respondent's employ. Accordingly, I would also conclude in these circumstances that Respondent's discharge of Hodgson was consistent with its established policy and was not discriminatorily motivated

and therefore not in violation of Section 8(a)(1) and (3) of the Act.

Since I have concluded that there is simply no credible evidence that Mahar, or any other Respondent representative, ever asked any employee how they felt about the Union, or to notify Respondent of union harassment or the identity of union representatives or supporters, I conclude that Respondent did not violate Section 8(a)(1) as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(1) and (3) of the Act, as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The complaint is dismissed in its entirety.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.